No. 84-1011

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In the Supreme Court of the United States

OCTOBER TERM, 1984

STEPHEN D. OLIPHANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction should be set aside because the government failed to disclose documents held by the grand jury containing confidential economic information regarding the business practices of some of petitioner's competitors that petitioner might have used to support an "economic defense" to the charge of conspiring to fix prices, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, or to impeach a government witness, where it has been established that the documents would not have affected the verdict.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A15-A21, A22-A25) is reported at 745 F.2d 49 (Table).[1] The opinion and order of the district court (Pet. App. A1-A14) denying petitioner's motion for a judgment of acquittal or for a new trial is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1984. A petition for rehearing was denied on October 18, 1984 (Pet. App. A26). The petition for writ of

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[1]The court of appeals' opinion as originally entered on August 24, 1984, appears at Pet. App. A16-A21. The portion of the court of appeals' August 24 opinion amended by the court's order of September 28, 1984, appears at Pet. App. A24-A25.

certiorari was filed on December 24, 1984, seven days out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiring to fix prices of electric weld steel tubing,[2] in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (Pet. App. A16).[3] Petitioner was placed on probation for three years, with the condition that he perform eight hours of community service per week for one year. The court of appeals affirmed (Pet. App. A15-A21, A24-25).

1. a. The evidence presented at trial, the sufficiency of which is not in dispute, showed that, beginning in 1962 and continuing into 1979, petitioner and several of his co-defendants engaged in a continuing conspiracy to fix the prices of electric weld steel tubing in the eastern United States, initially through an association known as the Welded Steel Tube Council (WSTC). From the inception of the WSTC, the conspirators agreed to engage in a variety of

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[2]Electric weld steel tubing is tubing produced by an electric weld process from flat steel strip. It is made in a variety of sizes and finishes for structural, mechanical, and electrical applications, including refrigeration, air conditioning, exercise, and recreational equipment; furniture; automotive and truck components; and electrical conduit.

[3]The grand jury indicted petitioner, the president of Roth Steel Tube Company (RST), nine corporations (including RST) and six other individuals for fixing prices of electric weld steel tubing in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Two individuals and five corporate defendants pleaded guilty. The jury convicted seven of the remaining defendants, including petitioner and his company, and acquitted two others. The district court also entered a judgment of acquittal in favor of two other defendants, and the court of appeals affirmed the district court's judgments (Pet. App. A18, A25).

collective anticompetitive and illegal conduct, such as fixing the amount and timing of general price increases and quoting prices to existing or new customers that would not disturb existing price levels in order to "keep [the] profit structure up" (Tr. 369).[4] The conspirators initially met to plan their activities through the WSTC, but by 1965 the ground rules of their scheme had become sufficiently well settled that the parties could carry out their plans without the WSTC by telephone (Tr. 146).

The conspiracy continued over the following 14 years, picking up new members, including the petitioner, along the way. During this period, the parties followed certain basic patterns to further the conspiracy's goals. For instance, following the announcement of a price increase by the steel manufacturers that supplied the conspirators, the parties would discuss their response by telephone and agree upon the amounts and approximate dates of a general price increase for tubing, which normally became the new price charged by each party (Tr. 573-578, 612-613, 777-779, 877, 889, 914; see generally Gov't C.A. Br. 12-14 & nn. 21-24). In addition, the parties contacted each other before quoting a price for tubing to a new customer to ensure that their agreed-upon prices would not be undercut (Tr. 577-578, 612-613, 868). Finally, the members of the scheme also made "basic account calls" or "checking calls" during which they exchanged price information with major customers supplied by two or more of the conspirators in order to determine whether one of the parties had made concessions to his customers (Tr. 135, 138, 570, 769-770, 867-868, 890-894).

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[4]References to the trial transcript are taken from the government's brief in the court of appeals.

Petitioner, the president of the Roth Steel Tube Company (RST), one of the early members of the conspiracy (see, *e.g.*, Tr. 102-103, 132, 375), was a major participant in the price fixing scheme. After taking charge of RST's operations during the early 1970's, petitioner often initiated contacts with his fellow conspirators in order to discuss and agree upon general price increases (see, *e.g.*, Tr. 164-174, 627-632; GX 1216, 1218). For instance, as Vincent Hoffman, a witness for the government, testified at trial (Tr. 164-170), petitioner and he agreed upon price increases for roughly a dozen different accounts between 1974 and 1978. In addition, petitioner coordinated general price increases as well as increases for specific customers with officials from Berger Industries, another member of the conspiracy, and petitioner and Berger Industries officials also informed each other of the prices that they quoted to customers, to ensure that neither one would undercut the other's price (Tr. 776-787, 894-897, 900, 902-907).[5]

b. Prior to trial, petitioner moved for disclosure of all information relating to pricing practices and similar matters followed by RST and its competitors, which would have included customer lists, pricing policies, and similar information that the grand jury had subpoenaed from competitors of the conspirators (Pet. App. A12). In

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[5]Irving Roth of Berger Industries also testified at trial as to petitioner's means of responding to apparent violations of the price fixing agreement (Tr. 902-906). In 1976, Roth contacted petitioner after receiving reports that an RST salesman had been quoting prices to other conspirators' customers without the approval of RST's home office, in violation of the parties' agreement not to quote prices to another's customers without checking with the other party beforehand. During that call, petitioner and Roth agreed to check with each other before submitting prices to each other's customers. When Roth brought a similar matter to petitioner's attention in 1977, petitioner apologized for the incident, said that it was a mistake, and assured Roth that it would not happen again.

response, the government moved for leave to disclose these items to petitioner pursuant to Fed. R. Crim. P. 6(e)(3). However, some of the parties from whom the grand jury had subpoenaed the documents objected to disclosure of the materials that they had produced (Pet. App. A12). The district court then ordered the government to submit another Rule 6(e)(3) application that more specifically identified the need to disclose the subpoenaed materials.

In that second application, the government submitted a list of the requested documents to the court and suggested that the government be allowed to retain the documents while making them available to all defendants (Pet. App. A12; *id.* at A24; 83-1331 C.A. App. 78A-83A). The government also represented to the district court that none of the sought-after items appeared to be exculpatory, but acknowledged that the materials might lend some support to an "economic justification" defense or might contain information that the defendants could use to impeach the government's witnesses (Pet. App. A12; 83-1331 C.A. App. 90A). The government also identified the documents in its possession and indicated the general nature of their contents by grouping them in categories reflecting the grand jury's subpoenas (83-1331 C.A. App. 78A-94A).

Relying upon the description of the documents submitted by the government and balancing the defendants' need for the information against the harm to their competitors from disclosure, the district court held (Pet. App. A12) that disclosure of these items was unnecessary because they were not exculpatory (8/11/80 Tr. 8-9). However, with the court's permission the government disclosed to the defendants all grand jury transcripts, all documents (including those materials subpoenaed from third parties) that had been used as grand jury exhibits, all documents produced by non-objecting third parties, all documents subpoenaed from the defendants, and all documents subpoenaed from

non-defendants that the government intended to use in preparation for trial and at the trial itself. Prior to trial, the government also provided the defendants with a list of its trial witnesses, statements made by those witnesses, and the witnesses' criminal records. See Gov't C.A. Br. 44 n.79.

c. Following the return of jury's verdict, the district court denied petitioner's motion for a new trial on the ground that the government had withheld exculpatory materials from the defense in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963) (Pet. App. A10-A13). Petitioner claimed (*id.* at A12-A13) that the sought-after materials would have supported a defense that other firms in the industry that had not been charged with price fixing followed virtually the same pricing policies that he had pursued. The court noted (*id.* at A12-A13) that petitioner had not presented this theory in support of disclosure prior to trial, but the court nonetheless rejected petitioner's new theory on the merits (*ibid.*).

The court held (Pet. App. A13) that the sought-after documents were not exculpatory under petitioner's new theory because the government had established petitioner's involvement in the conspiracy by direct evidence, rather than by circumstantial evidence, such as parallel pricing, and the economic information contained in the requested documents therefore would not have undercut the government's proof. The court also found (*ibid.*) that petitioner had not been prejudiced by the court's refusal to order the government to disclose the alleged *Brady* materials, because petitioner had not been denied the opportunity to present the defense that he belatedly offered and "could readily have subpoenaed the same information from the third parties directly" (*ibid.*).

2. The court of appeals affirmed in an unpublished opinion (Pet. App. A15-A21, A24-A25). The court agreed with the district court (*id.* at A24) that the government had

satisfied its obligations under *Brady* by submitting a descriptive list of the requested documents to the trial judge. Moreover, the court also found itself "unable to say that the requested material 'might have affected the outcome of the trial' " (Pet. App. A25 n.8 (quoting *United States* v. *Agurs*, 427 U.S. 97, 104 (1976)) because "[t]he requested materials consisted of other competitors' economic records, and would not have refuted the government's evidence regarding [petitioner's] criminal acts" (Pet. App. A25 n.8).[6]

ARGUMENT

The petition was filed out of time. Moreover, petitioner did not raise in the court of appeals one of the questions presented for review by this Court. Furthermore, the unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 7-8) that he was denied a fair trial because the government withheld potentially exculpatory information from him in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). However, petitioner is not entitled to disclosure of materials submitted to the grand jury absent a particularized showing of need for the requested items. See, *e.g.*, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959); *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958); *United States* v. *Short*, 671 F.2d 178, 184 (6th Cir.) (collecting cases), cert. denied, 457

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[6]The court of appeals also rejected petitioner's claims that the government's proof at trial varied from the allegations in the indictment and that he had been unfairly surprised by the testimony of two government witnesses who had not testified before the grand jury. See Pet. App. A19 & n.6, A24 & n.6. None of the other defendants appealed. The government appealed the judgments of acquittal entered by the district court in favor of co-defendants Russell and Daily Corporation, and the court of appeals affirmed those judgments. Pet. App. A18, A25.

U.S. 1119 (1982). Petitioner's request for these documents simply stated (83-1331 C.A. App. 38A-45A) that the documents were necessary to impeach government witnesses and to present an ill-defined "economic defense" to the charge of price fixing; it thus failed to meet the requisite standard for disclosure. In any event, as noted above (pages 5-6), prior to trial the government disclosed to petitioner all grand jury transcripts and all statements made by persons whom the government intended to call as witnesses at trial. The items not disclosed to petitioner—confidential economic information subpoenaed by the grand jury from third parties—would not have provided a basis for impeachment of the government's witnesses.[7] Finally, petitioner failed to demonstrate how the information he sought would have supported his defense to the charge of conspiring to fix prices for electric weld steel tubing. The district court thus properly refused to disclose this information.[8]

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[7]Petitioner wholly fails to substantiate his claim (Pet. 7) that the requested documents were necessary to impeach a government witness. The only government witness that petitioner identified in this respect in the court of appeals (Appellant Br. 44) was Irving Roth, who testified in part as to his agreements with petitioner to fix prices (see page 4 note 5, *supra*). However, petitioner has failed to explain how knowledge of his competitors' pricing strategies would have enabled him to impeach Roth's testimony that he and petitioner had agreed to fix prices. In addition, Roth was not the only witness for the government on this score (see page 4, *supra*).

[8]Since this case does not involve an otherwise meritorious *Brady* claim, there is no need to hold this decision pending the Court's decision in *United States* v. *Bagley*, No. 84-48 (argued Mar. 20, 1985), in which we contend that *Brady* does not require that a conviction be set aside for the government's failure to disclose specifically-requested information (assuming that petitioner's request falls into this category) unless the undisclosed evidence was exculpatory and would have affected the outcome of the trial. A copy of our brief in *Bagley* has been served on counsel for the petitioner.

As both the district court and the court of appeals recognized (Pet. App. A13, A25 n.8), the government's proof that petitioner, along with his confederates, had engaged in a conspiracy to fix prices in violation of Section 1 of the Sherman Act came largely in the form of direct, rather than circumstantial evidence, such as parallel pricing, and consisted of testimony by some of petitioner's co-conspirators. That proof was entirely inconsistent with his claim (Pet. 5) that he had only engaged in parallel pricing with the firms run by his fellow conspirators. Moreover, as the court of appeals recognized (see page 7, *supra*), petitioner's ill-defined "economic defense," for which he sought the requested documents, would in no way have undermined the government's proof, given the government's direct proof that petitioner had conspired with his confederates.[9]

2. Petitioner also claims (Pet. 7-8) that the district court erred by failing to examine the requested documents in camera before denying his disclosure request. However, petitioner did not assert this claim in either the district court or the court of appeals and therefore may not raise it here. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, no such examination was necessary in this case. The list of documents possessed by the grand jury provided to defense counsel by government counsel was

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[9]Petitioner errs in relying (Pet. 6, 8) upon the court of appeals' statement (Pet. App. A24) that the court might have resolved the *Brady* issue differently had it been presented to the court prior to his trial to support his claim that the requested documents were exculpatory. *Agurs* emphasized that "there is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge" (427 U.S. at 108) and made clear that "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial" (*ibid.*). The court of appeals' comment simply reflects this difference.

entirely adequate to enable petitioner to make any *Brady* arguments he might have had and to allow the district court to rule on his disclosure motion.[10] Petitioner has not suggested that counsel for the government failed to examine the documents or misrepresented their contents to the court. Absent some indication that the documents were exculpatory, which petitioner has not shown, the district court's failure personally to examine in camera each of the numerous documents sought by petitioner in his pre-trial *Brady* motion thus does not require reversal. See, *e.g.*, *United States* v. *Dinitz*, 538 F.2d 1214, 1224-1225 (5th Cir. 1976) (en banc), cert. denied, 429 U.S. 1104 (1977); *United States* v. *Franicevich*, 471 F.2d 427, 429 (5th Cir. 1973).[11]

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[10]Because the third-party documents had been obtained by the grand jury through subpoenas, the government could not disclose the documents without the permission of the court pursuant to Fed. R. Crim. P. 6(e)(3).

[11]Contrary to petitioner's claim (Pet. 9-10), the court of appeals' decision in this case does not conflict with the Fifth Circuit's rulings in *United States* v. *Diaz-Munoz*, 632 F.2d 1330 (1980), and *United States* v. *Gaston*, 608 F.2d 607 (1979). To begin with, the court of appeals' unpublished decision lacks any precedential force within the Third Circuit. Moreover, neither case cited by petitioner holds that in camera inspection by the court is required where government counsel has examined a large quantity of documents, some of which are allegedly exculpatory, and has disclosed to the district court the general nature of their contents. In *Diaz-Munoz*, the court of appeals remanded for an in camera inspection of documents that the district court had reason to believe were exculpatory (see 632 F.2d at 1333-1334) because counsel for the government had never personally examined the files in question or provided the district court with specific information regarding their contents (*ibid.*). In *Gaston*, the court of appeals stressed (608 F.2d at 612-613 (collecting cases)) that a court may often rule on *Brady* motions without conducting in camera inspection of the documents. In the particular circumstances of that case, however, the court of appeals held (632 F.2d at 613-614) that it was error for the district court not to examine two potentially exculpatory reports of witnesses' statements prepared by the FBI agents who had investigated the case that defense counsel had specifically requested. The facts of this case are not remotely similar to either Fifth Circuit decision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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